Khoo Kay Hoe (trustees of the estate of Oh Kee Lee @ Oh Phaik Sim, deceased) v Chor Phaik Har and another appeal

COURT OF APEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-03-7 OF 1996
SHAIK DAUD, ABU MANSOR AND ABDUL MALEK AHMAD JJCA
15 APRIL 1999

Bankruptcy *— Act of bankruptcy — Failure to pay costs in civil suit — Allocatur issued against appellants — Whether respondent entitled to commence bankruptcy proceedings based on allocatur*

The appellants were ordered to pay the respondent the costs in a civil suit. The costs were taxed and an allocatur was issued to that effect. As the costs were not paid, bankruptcy notice was issued against the appellants. Consequently, creditor's petition was issued and receiving and adjudication orders were made against the appellants. The appellants argued that an allocatur was not an order of court nor a judgment and a bankruptcy notice cannot be issued in respect of it. Thus, the receiving and adjudication orders were not validly made. The High Court held that the order for costs was a final order and as the final order required costs to be taxed by the registrar, the allocatur which bears the result of such taxation should rightly constitute part of and be read in conjunction with the final order. The respondent was therefore entitled to commence bankruptcy proceedings against the appellants based on the allocatur. The appellants appealed.

Held, dismissing the appeal:

In essence, the allocatur merged with the order for costs. The appellants would be liable to pay the costs stated in the allocatur. The attempt to say that bankruptcy proceedings could not be based on an allocatur when no steps had been taken to set them aside merely denote that if the court were to agree with this technicality, the respondent would not have any recourse at all to recover the cost against the appellants despite the final judgment or order. This would render the judgment or order meaningless. Further, the words 'or sum ordered to be paid' in para (i) of s 3 of the Bankruptcy Act 1967 after the words 'judgment debt' are qualified by the words 'in accordance with the terms of the judgment or order'. The allocatur was in accordance with the terms of the judgment or order in the relevant suit (see p 132A–D).

[Bahasa Malaysia summary

Perayu-perayu telah diperintahkan membayar kepada penentang kos-kos dalam suatu tindakan sivil. Kos-kos telah ditetapkan dan alokatur telah dikeluarkan. Memandangkan kos-kos tidak dibayar, suatu notis kebankrapan telah dikeluarkan terhadap perayu-perayu.

Seterusnya, petisyen pemiutang telah dikeluarkan dan perintah-perintah penerimaan dan penghukuman dibuat terhadap perayu-perayu. Perayu-perayu membantah bahawa suatu alokatur bukannya merupakan perintah mahkamah ataupun penghakiman dan suatu notis kebankrupan tidak boleh dikeluarkan berkenaan dengannya. Maka, perintah-perintah penerimaan dan penghukuman adalah dibuat secara tidak sah. Mahkamah Tinggi memutuskan perintah untuk kos-kos adalah perintah muktamad dan memandangkan perintah muktamad tersebut memerlukan kos-kos untuk ditetapkan oleh pendaftar, alokatur tersebut yang merupakan hasil penetapan sedemikian seharusnya merupakan sebahagian daripada dan dibaca bersama dengan perintah muktamad. Maka, penentang adalah berhak untuk memulakan prosiding kebankrapan terhadap perayu-perayu berdasarkan alokatur tersebut. Perayu-perayu merayu.

Diputuskan, menolak rayuan:

Pada dasarnya, alokatur tersebut bersatu dengan perintah untuk kos-kos. Perayu-perayu adalah bertanggungjawab untuk membayar kos-kos yang tercatat dalam alokatur. Percubaan untuk mengatakan prosiding kebankrapan tidak boleh berdasarkan suatu alokatur apabila tiada langkah-langkah telah diambil untuk mengketepikannya hanya bererti bahawa jikalau mahkamah bersetuju dengan perkara teknikal ini, penentang tidak akan mempunyai apa-apa jalan keluar sama sekali untuk mendapat kembali kos tersebut terhadap perayu-perayu meskipun terdapatnya penghakiman atau perintah muktamad. Ini akan menyebabkan penghakiman atau perintah tersebut tidak bermakna. Selanjutnya, perkataan-perkataan 'atau jumlah diperintah dibayar' dalam perenggan (i) s 3 Akta Kebankrapan 1967 setelah perkataan-perkataan 'hutang penghakiman' adalah terbatas oleh perkataan-perkataan 'menurut terma-terma penghakiman atau perintah'. Alokatur tersebut adalah menurut terma-terma penghakiman atau perintah di dalam tindakan berkenaan tersebut (lihat ms 132A–D).]

Notes

For cases on act of bankruptcy, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1556–1579.

Cases referred to

Cartwright & Anor v Barker [1975] 2 All ER 970 (refd)

Development & Commercial Bank Bhd v Datuk Ong Kian Seng [1995] 2 MLJ 724 (refd)

Haroun Al-Rashid bin Mohd Yusof, Re; ex p Daya Leasing Sdn Bhd [1996] 5 MLJ 317 (refd)

Wheeler (a debtor), Re [1982] 1 All ER 345 (refd)

Rengasamy Pillai v Comptroller of Income Tax [1970] 1 MLJ 233 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3, 131
Bankruptcy Rules 1969 r 18

Appeal from: High Court, Pulau Pinang (Bankruptcy Nos 29–416 of 1994 and 29–452 of 1994)

Ghazi Ishak (*Tan Beng Hong* and *Lim Ping Kok* with him) (*Tan Beng Hong & Co*) for the appellant.

Kek Ooi (*Lee Hong* with him) (*N Chandran* for the respondent.

Abdul Malek Ahmad JCA (delivering judgment of the court): There were two appeals before us but since they involved the same facts and issues and the same respondent, it was agreed at the outset that arguments would be confined only to the first appeal but that the decision would bind the second appeal as well.

Forming the factual framework of these two appeals are the following agreed facts:

(a) the appellants are the trustees of the estate of Oh Kee Lee @ Oh Phaik Sim, deceased;

(b) they were ordered on 7 September 1991 to pay the respondent the costs in Penang High Court Civil Suit No 315 of 1983 ('the relevant suit');

(c) the costs of the said action were taxed on 9 February 1994 at RM160,699.97 and an allocatur was issued to that effect;

(d) as the costs were not paid, bankruptcy notices were issued on 18 May 1994 and 8 June 1994 respectively against the appellants;

(e) consequently, on 23 November 1994, creditor's petitions were issued against the appellants;

(f) receiving orders and adjudication orders were made against the appellants on 26 April 1995;

(g) notices of appeal against the receiving orders and adjudication orders were filed by the appellants on 29 April 1995 to the judge in chambers;

(h) the said appeals were dismissed with costs on 1 August 1995; and

(i) a stay of all further proceedings was obtained on 22 August 1995 pending further appeals.

For a full picture of the situation, the heading of the relevant suit was as follows:

IN THE HIGH COURT OF MALAYA AT PENANG

CIVIL SUIT NO 315 OF 1983

BETWEEN

(1) Oh Phaik Lin
(2) Chor Saw Oon
(3) Khoo Kay Hoe
Trustees of the Estate of Oh Kee Lee @ Oh Phaik Sim, deceased ... Plaintiffs

AND

A (1) Choong Lye Hock Estates Sdn Bhd
(2) Chor Phaik Gnor
(3) Chor Phaik Har ... Defendants

It is clear, therefore, that the appellants here were two of the three plaintiffs in the relevant suit while the respondent here was the third defendant.

B Paragraph 6 of the relevant order dated 7 September 1991 reads:

> The plaintiffs be and are hereby at liberty to discontinue this suit pursuant to O 21 r 3 of the Rules of the High Court 1980 on terms that:
>
> (a) the plaintiffs be and are hereby deprived of their right to bring a fresh action in order to give effect to the doctrine of res judicata;
>
> C (b) the plaintiffs pay to the third defendant the costs of this action (including this application) to be taxed;
>
> (c) there be an inquiry before the senior assistant registrar to determine what damages (if any) was suffered by the third defendant by reason of the interim injunction which the plaintiffs, according to their undertaking, ought to pay.

D Before arguments commenced, we had also allowed the respective motions by the respondent, as there were no objections from the appellants, for Tan Jiak Chye to be appointed as the duly constituted legal representative of the estate of the named respondent, who had passed away on 28 August 1997, for the purpose of these appeals as he had in fact been so appointed for the E estate by the High Court on 17 November 1998.

Learned counsel for the appellants referred us to the English case of *Cartwright & Anor v Barker* [1975] 2 All ER 970 where the Chancery Division held (at pp 970g–971a):

> The appeal would be allowed and the bankruptcy notice set aside for the F following reasons:
>
> (i) in the case of costs the effective judgment was the decree of the court itself ordering costs to be paid, and not the certificate quantifying costs. Accordingly the relevant judgment or order for the purposes of the bankruptcy notice was the order of 5 November 1970 and not the taxing master's certificate. It followed that the bankruptcy notice was not in G accordance with the prescribed form nor in accordance with s 2 of the Bankruptcy Act 1914 because it did not require the sum to be paid in accordance with the terms of the judgment or order.
>
> (ii) The failure to comply with the bankruptcy notice was the act of bankruptcy on which all the rest was founded and unless the bankruptcy notice fulfilled the statutory requirements, it could not fairly be said that H a debtor had committed an act of bankruptcy by not complying with it. Accordingly, although the debtors did not seem to have been misled in any way, in the circumstances it would not be a proper exercise of the court's discretion to overlook or to attempt to cure the shortcomings of the bankruptcy notice.

I He also referred us to s 3 of the Bankruptcy Act 1967 ('the Act') which deals with acts of bankruptcy where para (i) of sub-s (1) provides as follows:

> (i) if a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice

under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, with interest quantified up to the date of bankruptcy notice or to secure or compound for it to the satisfaction of the creditor or the court, and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counter claim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained:

Provided that for the purposes of this paragraph and of s 5 any person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order;

Learned counsel then brought to our attention the relevant paragraph at p II 63 of the *Bankruptcy Handbook* of the MLJ Handbook Series which state:

> Final judgment or final order. An order or judgment, even on merits, liable to be varied on appeal cannot possibly be a final order or judgment (*Michael Kho Miang Haw v Teo Siaw Kheng (f) & Anor* [1996] 2 BLJ 388). Where costs taxed was endorsed on the decree in the form of a certificate by the Assistant Registrar, it was held that as the matter was concluded by the terms of the local legislation, objection that no final decree drawn up was unfounded (*Re Looi Guan Kway; ex p Low Say Hooi* [1941] MLJ 228). However, it was held that an order for payment of costs was not a final judgment and therefore a bankruptcy notice could not be issued, see *Re Leo Hoon Hong; ex p the Municipal Commissioners of the Town and Port of Malacca* [1951] MLJ 222; cf *Re SE Menahem* [1952] MLJ 136, where it was held that a judgment for costs only would support a bankruptcy petition. In the case of costs, the effective judgment is the decree of the court itself ordering costs to be paid and not the certificate quantifying cost (allocatur) (*Haroun Al-Rashid; ex p Daya Leasing* [1996] 5 MLJ 317).

In one of the case cited namely *Re Haroun Al-Rashid bin Mohd Yusof; ex p Daya Leasing Sdn Bhd* [1996] 5 MLJ 317, it was held (at p 317F–G):

> It was apparent that there was only one final judgment dated 28 June 1988. The order dated 27 July 1988 was in respect of costs which was the decree of the court itself on 28 June 1988 ordering costs to be paid by the appellant. Therefore, in the case of costs, the effective judgment was the decree of the court on 28 June 1988 itself, and not the order dated 27 July 1988 quantifying the amount (see p 320D-F); *Re Chen Chong Fatt Willy; ex p Hitachi Lease (S) Pte Ltd* [1987] 1 MLJ 94 distinguished.

To conclude, learned counsel submitted that an allocatur is not an order of court nor a judgment and a bankruptcy notice cannot be issued in respect of it. Thus the receiving orders and adjudication orders were not validly made.

The reply from the learned counsel for the respondent was that this was an interesting point with no decision at this level. The bankruptcy notice,

A he said, was founded on an allocatur. He stressed that the bankruptcy notice was valid notwithstanding the decision in *Cartwright*'s case.

Even if there is a defect, he continued, the defect is formal and is curable under s 131 of the Act which is reproduced below:

B > No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

C There was no application in any form, he emphasized, to resist the bankruptcy notice and for that reason, the appeals were distinguishable for the facts in *Cartwright*'s case where such an application was made. It was clear from the headnotes in that case that the debtors had applied to the county court to set aside the bankruptcy notice but their application was dismissed.

D Similarly, learned counsel further submitted, there was an application to set aside the bankruptcy notice in *Re Haroun*'s case. He then cited *Re Wheeler (a debtor)* [1982] 1 All ER 345 where it was held by the Court of Appeal that (at p 346d–f):

E > The bankruptcy notice of 6 November 1980 complied with ss 1(1)(g) and 2 of the Bankruptcy Act 1914 because although on its face the notice referred to four orders, namely the order for costs in the action and the orders for costs in the three procedure summonses, those four orders had been channelled into the interim certificate issued on 24 October 1980 for £20,000 and had thereby become one order relating to one debt (for £20,000) made in one action, and accordingly the bankruptcy notice did not refer to more than one order. Furthermore, the interim certificate issued on 24 October 1980 F constituted 'a final order' for the purposes of ss 1(1)(g) and 2 even though the inquiries ordered by the judge into damages and the profit if any obtained from a particular transaction had not been completed (see p 348g–j, p 349b, p 350h–j, pp 351d, e, j–352a, p 353f post); *Re Alexander; ex p Alexander* [1892] 1 QB 216 applied; *Re Low, ex p Argentine Gold Fields Ltd* [1891] 1 QB 147 distinguished.

G Learned counsel also reiterated that the relevant application was made in accordance with r 18 of the Bankruptcy Rules 1969 and there was nothing in the affidavits to challenge the bankruptcy notice.

In the Federal Court case of *Development & Commercial Bank Bhd v Datuk Ong Kian Seng* [1995] 2 MLJ 724, the relevant excerpt of the H judgment state (at p 731C–E):

> Rule 18 of the Rules further provides that except where the Rules or the Act provide, every application shall, unless the court otherwise directs, be made by motion supported by an affidavit. In *Datuk Lim Kheng Kim*, the Supreme Court held that failure to follow r 18, which requires an application to be made by motion supported by affidavit, renders an affidavit in opposition ineffective I and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that the debtor has a counterclaim, set-off or cross-demand which equals or exceeds the judgment

debt, must be made by filing a notice of motion supported by an affidavit. This court has no reason to disagree with the decision and will follow it. Accordingly, in our view, the respondent's affidavit in opposition cannot be substituted as a notice to show cause against the creditor's petition to challenge the validity of the bankruptcy notice.

That judgment had also made reference to the Privy Council case of *Rengasamy Pillai v Comptroller of Income Tax* [1970] 1 MLJ 233 (PC) where a distinction had been drawn between a defect which renders the bankruptcy proceedings a nullity and a mere formal defect or irregularity. The relevant excerpt reads (at p 236C–H):

> But there is relevant authority upon the construction of the identical words in s 147(1) of the English Bankruptcy Act 1914. It is implicit in the section that proceedings in bankruptcy may be so defective as to render them a nullity notwithstanding that no substantial and irremedial injustice has in fact been caused by the defect. The section draws a distinction between such a defect and a 'formal defect or irregularity'. It is only the latter which are validated by the section, provided that no substantial and irremedial injustice has been caused.
>
> What then is 'a formal defect or irregularity' within the meaning of the section? This was discussed in relation to a bankruptcy notice in *Re a Debtor; ex p The Debtor v Bowmaker Ltd* [1951] 1 Ch 313 in which the earlier authorities were considered. The test there laid down was whether the defect in the notice was of such a kind as could reasonably mislead a debtor upon whom it was served. If it was, the notice was not validated by the section notwithstanding that the particular debtor upon whom it was served was not in fact misled. If on the other hand it could not reasonably mislead the debtor it was a formal defect and validated by the section. *Their Lordships are here only concerned with the application of the section to a bankruptcy notice. They are not concerned with whether the same test is appropriate to determine the validity of subsequent steps in bankruptcy proceedings. In their view any failure to comply with the statutory provisions as to the form of a bankruptcy notice of a kind which could not reasonably mislead a debtor upon whom it is served is a 'formal defect' and validated by the section.* (Emphasis added.)

Before the learned judge in the court below, two issues were raised in the appeal against the decision of the learned deputy registrar. Apparently the first one, which was that the judgment debtors were not personally liable for the costs incurred, had been abandoned before us as this point was never raised.

The second issue was that the judgment debtors had not committed an act of bankruptcy within the meaning of para (i) of sub-s (1) of s 3 of the Act as a bankruptcy notice could not be founded on an allocatur. On this point, this is what the learned High Court judge said:

> On the second issue raised by the judgment debtor, Mr Tan argued that the bankruptcy notice dated 8 June 1994 was based on the allocatur dated 9 February 1994, whereas, in his contention, an allocatur is not a final judgment or an order for costs. In support, he cited the case of *Re Alexander; ex p Alexander* [1892] 1 QB 216 (CA).
>
> Counsel for judgment creditor argued that the order dated 7 September 1991 is a final order as it granted leave to the judgment debtor to discontinue

his actions vide Civil Suit No 315 of 1983 against the judgment creditor on terms, inter alia, that: (a) judgment debtor do pay costs to the judgment creditor and for assessment of damages; and (b) the judgment debtor is debarred from bringing a fresh action to give effect to the doctrine of res judicata. He referred to para 6 of the order of court dated 7 September 1991 in Civil Suit 315 of 1983 which states as follows:

> (6) the plaintiffs be and are hereby at liberty to discontinue this suit pursuant to O 21 r 3 of the Rules of the High Court 1980 on terms that:
>
> (a) the plaintiffs be and are hereby deprived of their right to bring a fresh action in order to give effect to the doctrine of res judicata;
>
> (b) the plaintiffs pay to the third defendant the costs of this action (including this application) to be taxed;
>
> (c) there be an inquiry before the senior assistant registrar to determine what damages (if any) was suffered by the third defendant by reason of the interim injunction which the plaintiffs, according to their undertaking, ought to pay;

In my judgment, the order of 7 September 1991 is clearly — considering the peculiar words expressed therein — a final order granting leave to the judgment debtor to discontinue his actions, a fortiori as the order expressly debars the judgment debtor from bringing a fresh action. No other interpretation can be given to it, as it was further declared therein that any fresh action would run foul of the doctrine of res judicata. In my considered view, as the final order required costs to be taxed by the registrar, the allocatur which bears the result of such taxation should rightly constitute part of and be read in conjunction with the final order of 7 September 1991, which is crystal clear in its content. The judgment creditor is therefore entitled to commence bankruptcy proceedings against the judgment debtor based on the allocatur, which in any event, was submitted therein together with the final order of court dated 7 September 1991.

Further, upon closer reading, *Re Alexander* cited by Mr Tan would appear to me to be in favour of the judgment creditor rather than his client; as therein it was held that as soon as an order for costs to be paid by the defendant had been taxed, the judgment therein was an absolutely final one, upon which the plaintiff was entitled to at once issue a bankruptcy notice against the defendant for the amount of taxed costs, by way of execution. I cannot see how the basis position *Re Alexander* is dissimilar to the current case although Mr Tan had submitted that in the present case, something remained to be done (in the order of 7 September 1991) by way of discontinuance of the case. I take this approach because of the finality of the terms in which the order of 7 September 1991 had been worded. In any event, generally a successful defendant's costs are provable in the plaintiff's bankruptcy, provided that the verdict is obtained — or the judgment awarding costs is pronounced — prior to the date of adjudication or receiving order. (See Williams and Muir Hunter *The Law and Practice in Bankruptcy* (19th Ed) p 156 and 3 *Halsbury's Law of England* (4th Ed) para 724.

Having considered the arguments on both sides, we were inclined to agree with learned counsel for the respondent and the learned High Court judge. We are faced with a situation here where the so called final judgment or order relates to the costs which form the basis of the consequent bankruptcy proceedings. But those costs are not quantified in that final order. This is

followed by the allocatur where the quantification takes effect. In essence, the allocatur merges with the order for costs.

What follows are the bankruptcy proceedings to recover the judgment debt for costs. The appellants chose not to do anything at all to set aside those proceedings. Were they misled? We find that suggestion quite impossible since the number of the relevant suit is stated in all the relevant papers.

Would not they be liable to pay the costs stated in the allocatur? We hold that they would be and this attempt to say that bankruptcy proceedings cannot be based on an allocatur when no steps had been taken to set them aside merely denotes that if we were to agree with this technicality, the respondent would not have any recourse at all to recover the costs against the appellants despite the final judgment or order. This would render the final judgment or order meaningless.

We are further fortified in our reasoning by the words 'or sum ordered to be paid' appearing twice in para (i) of sub-s (1) of s 3 of the Act after the words 'judgment debt'. The first time they appear, they are qualified by the words 'in accordance with the terms of the judgment or order'. The allocatur, in our view, is in accordance with the terms of the judgment or order in the relevant suit.

Accordingly, we dismissed both appeals with costs. The deposits are to go to the respondent to account of their taxed costs.

Appeals dismissed with costs.

Reported by Jafisah Jaafar